Supreme Court, U.S.
FILED
APR 17 2009
OFFICE OF THE CLERK

No. 08-1483

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON KUIIN, d.b.a. CRYSTAL CAVERNS

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRANDON KUHN, Petitioner Pro Se
8625 FM 1863
San Antonio, Texas 78266
(210) 777-9911

QUESTION PRESENTED FOR REVIEW:

The question before this honorable court must be prefaced as follows:

I was denied a high explosives permit by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The denial pertains to the construction of the word "punishable" as it appears in 18 U.S.C. § 842(i)(1)

> "It shall be unlawful for any person...who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce."

Simply put, I have a 1999 conviction for a violation of 18 U.S.C. § 472 ("Uttering counterfeit obligations or securities"). At the time of my sentencing, the Federal Sentencing Guidelines (still mandatory in 1999) called for an imprisonment range between 0 months and 6 months, while the statute associated with my crime called for a maximum of 15 years imprisonment.

ATF has constructed the word "punishable" to hinge only on the statute defining the offense, while I have constructed the word "punishable" to hinge on all statutes determining sentencing, including not only those that empower the court to sentence but those that limit the legitimacy of its' exercise of that power.

The question before this court is simply which construction is correct.

PARTIES TO PROCEEDING:

All parties appear on the cover of this petition, and there is no parent or publicly held company owning 10% or more of Crystal Cavern's stock.

OFFICIAL ORDERS AND BASIS FOR JURISDICTION:

The US Court of Appeals for the Fifth Circuit filed their original decision on December 2, 2008.

The same court filed a denial of petition for rehearing on January 27, 2009.

Under 81 U.S.C. § 1254, this case may be heard by the Supreme Court by writ of certiorari.

And the filing is timely.

STATUTUE OF CONSIDERATION:

18 U.S.C. § 842(i)(1)

> "It shall be unlawful for any person…who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce."

STATEMENT OF CASE:

The entire case hinges on the appropriate construction of the word "punishable" as it appears in 18 U.S.C. § 842(i)(1).

I applied to ATF for a high explosives permit. My application was denied based on ATF's construction of the word "punishable".

I requested an administrative review and was denied. Pursuant to 5 U.S.C. § 706, I appealed to the US Court of Appeals for the Fifth Circuit. The appeal was denied, and the Fifth Circuit's decision contained an egregious misrepresentation of my legal argument. (see appendix)

I requested a rehearing with the Fifth Circuit. The request was denied.

I now appeal to the US Supreme Court.

ARGUMENT:

Since this entire case hinges on the appropriate construction of the word "punishable" as it appears in 18 U.S.C. § 842(i)(1), it is wise to view any analogous constructions already made by the U.S. Supreme Court. Therefore, it is appropriate to consider the construction of the word "authorized" as found in US Supreme Court Certiorari No. 90-1577 *United States v. R.L.C.*, 503 U.S. 291 (1992). (pertinent text below)

> **"Plain meaning analysis does not compel adoption of the Government's construction that the word "authorized" in § 5037(c)(1)(C) must refer to the maximum term of imprisonment provided for by the statute defining the offense. At least equally consistent, and arguably more natural, is the construction that "authorized" refers to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power, including § 3553(b) which requires application of the Guidelines**

and caps an adult sentence at the top of the relevant Guideline range"

So we can see that it is correct to view the maximum term of imprisonment for an offense as limited by the sentencing guidelines created in 18 USC § 3553(b)(1), and **NOT** merely by the statute defining the offense. In *RLC*, the Government's construction of the meaning of the word **"authorized"** was flawed because it failed to take into account the Federal Sentencing Guidelines, which limit the **authorization** of punishment. Likewise, in the case currently before this court, the Government is attempting a similar construction of the meaning of the word **"punishable"** in an attempt to exclude the Federal Sentencing Guidelines from being considered. But of course if the Federal Sentencing Guidelines control the maximum term of imprisonment "**authorized**", then they also dictate which crimes are "**punishable**" by more than a year in prison, as well as which crimes are **NOT** "**punishable**" by more than a year in prison. The question of the appropriate construction now falls squarely at the feet of this court.

I hereby request a Supreme Court Ruling in order to remedy the situation.

BRANDON KUHN, Petitioner Pro Se
8625 FM 1863
San Antonio, Texas 78266
(210) 777-9911

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 2, 2008

Charles R. Fulbruge III
Clerk

No. 08-60550
Summary Calendar

BRANDON KUHN, doing business as Crystal Caverns

Petitioner

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
(ATF)

Respondent

On Petition for Review from
an Order of the Department of Justice
Agency No. 5-TX-091-33-PA-01118

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Brandon Kuhn ("Kuhn") petitions this court for a review of the Respondent Bureau of Alcohol, Tobacco, Firearms, and Explosives's ("ATF") denial of his application for a permit to import, manufacture, or deal in explosive materials. *See* 18 U.S.C. § 842. Kuhn appealed the ATF's decision pursuant to 18 U.S.C. § 843(e)(2). At the first level of review, an Administrative Law Judge conducted a hearing and recommended denying Kuhn's application. The Director of Industry Operations of the ATF, representing the Attorney General, sustained the denial in a written decision. Kuhn now petitions this court for review.

We review the denial of an explosives permit pursuant to the Administrative Procedure Act ("APA"), codified at 5 U.S.C. §§ 701-706. *See* 18 U.S.C. § 843(e)(2). Pursuant to 5 U.S.C. § 706(2)(A) & (C), we "hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

As the reviewing court, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706 [1] "To the extent that this appeal challenges the Director's interpretation of the statutory provisions ATF administers, we utilize principles of *Chevron* deference." *Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, --- F.3d ----, 2008 WL 4530536, at *4 (3d Cir. Oct 10, 2008) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

Pursuant to 18 U.S.C. § 842(i)(1), ATF denied Kuhn an explosives permit because "[i]t shall be unlawful for any person ... who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce." Kuhn argues that the application of this provision to deny his application is in error. Kuhn concedes he was previously convicted of one violation of 18 U.S.C. § 472 ("Uttering counterfeit obligations or securities"), which is an offense that has a statutory maximum penalty of 20 years imprisonment.

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[1]Kuhn has moved to strike portions of the administrative record because he alleges those portions are either incorrect or prejudicial to his case. Pursuant to § 706, we must review the entire administrative record or those parts of it cited by the parties with due account taken of the rule of prejudicial error. Kuhn does not cite to any authority that permits this reviewing court to strike portions of the record based solely on one party's wishes and conclusory allegations of prejudice. Even assuming *arguendo* that we strike the portions that Kuhn requests, any change to the administrative record does not affect our decision. We therefore deny Kuhn's motion to strike.

However, Kuhn contends that because the Sentencing Guidelines were mandatory at the time of his conviction, the term of his actual sentence controls whether he committed a crime punishable for a term exceeding one year. According to Kuhn, because his guidelines sentence was between zero to six months imprisonment, his convicted offense was not a crime punishable by imprisonment for a term exceeding one year and therefore § 841(i)(1) should not bar him from obtaining an explosives permit.

His argument is without merit. The statute's plain language indicates that the application of § 841(i)(1) turns on the term of imprisonment punishable by the offense of conviction and indictment and does not turn on the petitioner's actual sentence. In interpreting another statute with identical language, the Supreme Court has noted that "[i]t was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of "a crime punishable by imprisonment for a term exceeding one year."" *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 113 (1983) (interpreting 18 U.S.C. § 922(g)).[2] In other words, the petitioner's actual sentence is irrelevant to the statute's application. Since the offense of petitioner's valid conviction is punishable by imprisonment exceeding one year, the ATF acted in accordance with law and was not arbitrary nor capricious in denying his permit application.

For the foregoing reasons, the petition for review is DENIED.

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[2]This holding remains good law even though other aspects of *Dickerson* have been effectively superseded by statute. *See Caron v. United States*, 524 U.S. 308, 313 (1998); *United States v. Daugherty*, 264 F.3d 513, 516 & n.7 (5th Cir. 2001); *United States v. Cisneros*, 112 F.3d 1272, 1281 (5th Cir. 1997).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. Court of Appeals

FILED
January 27, 2009

Charles R. Fulbruge III
Clerk

No. 08-60550

BRANDON KUHN, doing business as Crystal Caverns
Petitioner

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
(ATF)
Respondent

Petition for Review of an Order of the
U.S. Department of Justice

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 12/2/08, 5 Cir., _____, _____ F. 3d _____)

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ James Dennis
United States Circuit Judge

REHG-5A

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF
THE MANDATE

Supreme Court, U.S.
FILED
APR 17 2009
OFFICE OF THE CLERK

No. 08-1483

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON KUHN, d.b.a. CRYSTAL CAVERNS

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

BRANDON KUHN, Petitioner Pro Se
8625 FM 1863
San Antonio, Texas 78266
(210) 777-9911

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UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
BUREAU OF ALCOHOL, TOBACCO, FIREARMS
AND EXPLOSIVES

January 30, 2008

IN THE MATTER OF:
BRANDON KUHN D.B.A. CRYSTAL CAVERNS
ATF CASE NO. 5-TX-091-33-PA-01118

SUMMARY DECISION AND ORDER

I. PROCEDURAL HISTORY

This is a recommended summary decision and order based on the pleadings, papers, and exhibits submitted by the parties in this matter which are hereby incorporated by reference.

By a Notice of Denial dated October 4, 2006, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF, the Bureau, or the government) denied the application of Brandon Kuhn d/b/a Crystal Caverns (Respondent or the applicant) for a Type 33 explosives permit. The government had previously denied Kuhn's application for relief from disabilities under Federal Explosives Laws. Kuhn made a request for a hearing respecting the denial of his application for the permit, and I was designated to preside.

Pursuant to an order issued on July 5, 2007, the parties filed their respective prehearing statements together with their witness and exhibit lists, and a telephonic prehearing conference was subsequently conducted in this matter on Thursday, September 6, 2007. The government was represented by Carla E. Young, Esq., and the respondent appeared on his own behalf. The

parties agreed that Kuhn's request for hearing was filed in a timely manner, and stipulated to the following facts:

1. Brandon Kuhn was convicted of violating one count of 18 U.S.C. § 472, possession of counterfeit obligations, in the United States District Court, Western District of Texas, case number SA-99-CR-8-(01)-HG.

2. Brandon Kuhn filed an "Application for Restoration of Explosives Privileges" and an "Application for License or Permit" with ATF.

3. Brandon Kuhn's relief application was denied by ATF in a letter from Lewis Raden, Assistant Director of ATF (Enforcement Programs and Services) dated June 7, 2004.

4. Brandon Kuhn requested that ATF reconsider its decision to deny his application for relief by memorandum to Lewis Raden.

5. ATF denied Brandon Kuhn's request for reconsideration by letter dated April 1, 2005, signed by Carson W. Carroll (ATF Chief, Arson and Explosives Programs Division).

Copies of the parties' exhibits are attached to their respective prehearing statements. The government's exhibits are as follows:

G-1. Notice of Denial, 15 pages,
G-2. Proof of Service for Notice of Denial, 3 pages,
G-3. Applicant's Request for hearing, 3 pages,
G-4. Application for Explosives License or Permit submitted by Brandon Kuhn, 5 pages,
G-5. Judgment in a Criminal Case, 5 pages,
G-6. "Order" (early termination of probation), 1 page,

G-7. Letter dated 6/7/2004 denying application for relief from disabilities, 2 pages,
G-8. Memo from Brandon Kuhn to Lewis Raden dated 8/4/2004, 3 pages,
G-9. Letter from ATF dated 4/1/05 denying request for reconsideration, 1 page, and
G-10. Explosives Qualification Report of inspection April 6, 2006, 6 pages.

Kuhn's exhibits are as follows:

R-1. Memo from Senior U.S. probation Officer Don Hanson, 1 page,
R-2. Memo from Al Gray, 1 page,
R-3. Personal Note from Al Gray to Brandon Kuhn, 1 page,
R-4. Memo from Ben Kim, I page,
R-5. Basic Business Plan for Cavern Development, 5 pages,
R-6. Photocopy Pictures of the Caverns, 11 pages,
R-7. Picture of Brandon in very remote part of Caverns, 1 photo
R-8. Photocopy Pictures illustrating construction of explosive storage magazine, 12 pages,
R-9. Email from United States Sentencing Commission to Brandon Kuhn, 1 page, and
R-10. Email from Richard West to Brandon Kuhn, I page.

During the conference the parties identified both legal and factual questions posed by this case. At issue is the propriety of ATF's denial on or about October 4, 2006 (Gov't Exhibit G-1) of Kuhn's Application for Explosives License or Permit (Gov't Exhibit G-4). Because it became apparent that there was a threshold legal question respecting Brandon Kuhn's eligibility for the permit in the first instance, the parties were requested to address the issue of Kuhn's eligibility prior to

scheduling a hearing date. The government thereafter filed a Motion for Summary Judgment or for Decision on the Pleadings and Kuhn filed his own motion with a brief in response.

II. BACKGROUND FACTS AND RELEVANT STATUTES

The record reflects that on August 19, 1999 Kuhn was convicted in the Western District of Texas of one count of an indictment charging Possession of Counterfeit Obligations in violation of 18 U.S.C. § 472. (Gov't exhibit G-5). Pursuant to the Sentencing Reform Act of 1984, Kuhn was sentenced to a term of five years probation, and a fine of $300.00. (*Id.* pages 2-4). The Court expressly made a downward departure from the fine set by the guideline range because of its finding as to Kuhn's inability to pay. (*Id.* page 5). By an order dated August 14, 2002, Kuhn's motion for early termination of his probation was granted. (Gov't exhibit G-6).

The statute under which Kuhn was convicted, 18 U.S.C. § 472 provides,

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.[1]

Whether Brandon Kuhn is eligible for the permit he seeks depends upon whether he is a person convicted of

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[1] The Sentencing Classification of Offenses, 18 U.S.C. § 3559(a) indicates that if not specifically categorized by a letter grade in the statute, a crime for which the maximum penalty is less than twenty-five but more than ten years is a Class C felony.

a crime punishable by imprisonment for a term exceeding one year by virtue of his federal felony conviction in 1999 for violating one count of 18 U.S.C. § 472, possession of counterfeit obligations. The question is a purely legal one.

The Safe Explosives Act, 18 U.S.C. §§ 841 et seq., makes it unlawful to distribute explosives to an individual who has been convicted in any court of "a crime punishable by imprisonment for a term exceeding one year." § 842(d)(2). Similarly, § 842(i)(1) makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to ship, transport, receive or possess explosives. A person so described may not obtain an explosives permit under 18 U.S.C. § 843(b)(1), but may apply for relief from disabilities pursuant to § 845(b)(1).

ATF regulations governing commerce in explosives, 27 C.F.R. Part 555, with certain exceptions not relevant here, define the term "crime punishable by imprisonment for a term exceeding one year" as "[a]ny offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of one year." 27 C.F.R. § 555.11. It is clear from the language of the regulation, and the parties agree, that the sentence actually imposed in Kuhn's case has no bearing on the question of his eligibility.

III. POSITIONS OF THE PARTIES

The government contends that under 18 U.S.C. § 843(b)(1) and 27 C.F.R. § 555.49(a)(2)(ii) Kuhn is not eligible to obtain the permit or license he applied for, because it is the maximum sentence authorized under the criminal statute of conviction, not the sentence called for in the sentencing guidelines for a particular

defendant, which determines whether a crime is one "punishable by imprisonment for a term exceeding one year."

Kuhn argues, in contrast, that the language of 18 U.S.C. § 842, "crime punishable by imprisonment for a term exceeding one year" does not refer to the penalty provision set out in the statute pursuant to which he was convicted, but rather to the maximum sentence permitted under the Sentencing Guidelines for the specific Guideline Range to which the Court found him to belong. In sentencing Kuhn, the Court adopted the findings in his presentence report concluding that his offense level was 7 and his criminal history level was 1, so the presumptive imprisonment range was from 0 to 6 months. (Gov't Exhibit (1-5, page 5). Although not citing specifically to *United States v. Booker*, 543 U.S. 220 (2005), Kuhn pointed out that at the time of his conviction and sentencing, the guidelines were regarded as mandatory, not merely advisory, as was held in *Booker*.[2] He thus argues that under the sentencing guidelines he could not have been sentenced to a term of imprisonment exceeding one year, and for this reason he is not precluded from obtaining an explosives permit.

IV. DISCUSSION

While courts have not had the occasion to construe the specific language "crime punishable by imprisonment for a term exceeding one year" in the context of the Safe

[2] *Booker* held that the facts (other than a prior conviction) necessary to support a sentence exceeding the maximum established by a plea or jury verdict must be admitted or found by a jury rather than by the sentencing judge. To the extent the guidelines required sentence enhancements based on facts found judicially by only a preponderance of the evidence, such sentences were held to violate a defendant's Sixth Amendment right to trial by jury.

Explosives Act, substantially identical language in the analogous Gun Control. Act, 18 U.S.C. § 921 et seq., has long and consistently been interpreted in the Fifth Circuit as referring to a felony conviction. In *United States v. Giles*, 640 F.2d 621, 623 (5th Cir. 1981), the defendant had been convicted of unlawful receipt of a firearm by a person who had been convicted of a "crime punishable by imprisonment for more than one year" in violation of 18 U.S.C. § 922(h). With respect to the statutory language, the court observed, "[t]he avoidance of the term 'felony' was apparently intentional, although the definition used in § 922(h)(1) 'crime punishable by imprisonment for a term exceeding one year' is the definition of "felony" as that term is generally applied to crimes under federal law" *Id.* at 623 n.l; *see also United States v. Daugherty*, 264 F.3d 513, 514-15 (5th Cir. 2001) (examining the language of 18 U.S.C. § 922(g)(1)) prohibiting a person convicted of a "crime punishable by imprisonment for a term exceeding one year," from possessing a firearm affecting interstate commerce, and observing that the effect of the statute was to prohibit such possession by a felon); *Dreher v. U.S. Bureau of Alcohol, Tobacco & Firearms*, 115 F.3d 330 (5th Cir. 1997) (declining to declare that the appellant was not a convicted felon for purposes of 18 U.S.C. § 921(a)(20)); *United States v. Minnick*, 949 F.2d 8 (1st Cir. 1991) (rejecting claim that defendant was not a felon for purposes of § 922(g)(1)). Violation of § 922(g)(1) is in fact popularly known as the offense of being a "felon in possession." *See, e.g., United States v. Villegas*, 494 F.3d 513, 514 (5th Cir. 2007). The Interim Rule incorporating recent amendments made to 27 C.F.R. Part 555, noted, moreover, that among the categories of persons who may not lawfully possess or receive explosive materials are those under indictment for, or convicted of, a felony. The notice explained that the categories of persons prohibited from obtaining explosives are consistent with the categories of persons

similarly prohibited from receiving or possessing firearms. Implementation of the Safe Explosives Act, 68 Fed. Reg. 13768, 13774 (March 20, 2003). Black's Law Dictionary too, notes that under federal law, as well as under many state statues, the term "felony" refers to any offense punishable by death or imprisonment for a term exceeding one year, and that the term was used at early common law to describe the more serious offenses cognizable in the royal courts. 651 (8th ed. 2004). Conviction of a felony has long been the basis in our jurisprudence for the denial of various privileges, permits, and licenses without regard to the sentence actually imposed or which might have been imposed. A felony conviction is all that is required. *See generally*, Kathleen Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 Fed. Probation 10 (1996) (noting restrictions on voting, holding office, possessing firearms, public employment, jury service); *Note, Civil Disabilities of Felons*, 53 Va. L. Rev. 403,406-07(1967); *cf. Moosa v. INS*, 171 F.3d 994, 1000 (5th Cir. 1999) (stating that under 8 U.S.C. § 1255a(b)(1)(C)(ii), permanent resident status may not be granted to an alien convicted of a felony). The same has long been true under state laws with respect to a variety of occupational and professional licenses. *See, e.g.*, Brian K. Pinaire et al., *Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders*, 13 Va. J. Soc. Pol'y & L. 290 (2006); Drug Abuse Prevention and Control Act, 21 U.S.C. § 824(a)(2) (providing that registration to manufacture, distribute, or dispense certain controlled substances may be revoked where registrant convicted of a felony); 16 Tex. Admin. Code § 311.6(b)(1)(C) (2007) (providing that the Texas Racing Commission may deny, suspend or revoke a license to engage in legalized horse racing if licensee has been convicted of a felony); *Hawker v. New York*, 170 U.S. 189 (1898) (upholding

validity of statute prohibiting practice of medicine by convicted felon). While the wisdom of such restrictions is subject to debate, their legality is not.

This is the context in which Kuhn argues that the sentencing guidelines enacted pursuant to the Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, 98 Stat. 1837 (codified. at 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-98), should displace the statute of conviction as the measure of whether he is eligible for the license he seeks. Like the defendant in *Giles*, Kuhn completed the ATF application form which contains a question asking whether the applicant has ever been "convicted in any court of a **felony**, or any other crime, for which the judge could have imprisoned that person, for more than one year, even if he or she received a shorter sentence, including probation." (Gov't. Exhibit G-4, page 3). Kuhn, like Giles, checked the box for "no."

That the guidelines were enacted for the principal purpose of eliminating sentencing disparities is beyond cavil. *See* Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 Wake Forest L.Rev. 291, 295-96 (1993). ("[Q]uite frankly, all other considerations were secondary."). Still, adoption of the guidelines did not mean that no deviation from them was ever permissible; the Act expressly permits a district court to depart from the presumptive sentencing range under specific circumstances. 18 U.S.C. § 3553(b). As explained in *Mistretta v. United States*, 488 U.S. 361, 367-68 (1989), although the Act makes the guidelines binding on the courts,

> [I]t preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did-not adequately consider when formulating guidelines. §§ 3553(a) and (b). The Act also requires the

court to state its reasons for the sentence imposed and to give "the specific reason" for imposing a sentence different from that described in the guideline. § 3553(c).

Thus even prior to *Booker*, courts recognized that a sentencing judge could depart from the "mandatory" guidelines when appropriate; indeed, in sentencing Kuhn, the Court expressly made a downward departure in the fine called for by the guidelines based on his inability to pay. Had the Court found other specific reasons to do so, it clearly had the authority to depart from the guidelines.

United States v. R.L.C., 503 U.S. 291 (1992), which Kuhn cites in support of his position, involved the analysis of different language in a provision of the Juvenile Delinquency Act, 18 U.S.C. § 5037(c)(1)(B), which limited the length of detention of a juvenile to the maximum term that would be authorized had the juvenile been tried and convicted as an adult. *Id.* at 298-99. The focus of the decision was on the interpretation of the statutory term "authorized," which the court found in the context of the legislation to be ambiguous. After examining the legislative history of the provision the court concluded that the "language suggests a change in reference from abstract consideration of the penalty permitted in punishment of the adult offense, to a focused enquiry into the maximum that would be available in the circumstances of the particular juvenile before the court." *Id.* at 299.[3] *But see United States v. LaBonte*, 520 U.S. 751, 758-62 (1997) (distinguishing R.L.C. and stating that statutory term "maximum term authorized" is not ambiguous and

[3] The result in *R.L.C.* may have been necessitated by the fact that otherwise a juvenile might in some circumstances receive a longer sentence than a similarly situated adult would receive. This would be contrary to legislative intent that juvenile sentences should be less than adult sentences.

means the maximum prison term available for the offense of conviction including any applicable statutory sentencing enhancements).

The short answer to Kuhn's argument in any event is, as was observed in *United States v. Shimoda*, 334 F.3d 846, 849 (5th Cir. 2003), that "*R.L.C.* does not support the proposition that a maximum sentence in federal criminal cases is that prescribed by the federal sentencing guidelines, and no court has so held." Neither have state sentencing guidelines ever been held to be dispositive; as explained in *United States v. Parry*, 479 F.3d 722, 725 (9th Cir. 2007), sentencing guidelines provide a presumptive sentence, not the maximum sentence, which is set by the statute criminalizing the conduct. See *United States v. Murillo*, 422 F.3d 1152 (9th Cir. 2005). Similarly, in the context of revocation of supervised release, courts have uniformly rejected the analogous suggestion that Booker altered the definition of "statutory maximum." *See, e.g., United States v. Ray*, 484 F.3d 1168, 1171 (9th Cir. 2007); *United States v. Lovett*, 467 F.3d 374, 377 (3d Cir. 2006); *United States v. Alfaro-Hernandez*, 453 F.3d 280, 282 (5th Cir. 2006); *United States v. Work*, 409 F.3d 484, 489-90 (1st Cir. 2005).

R.L.C. involved guidance and direction given to a sentencing court, and the case makes clear that application of the sentencing guidelines depends upon particularized findings of fact and determinations to be made by the sentencing judge. Here, unlike the scenario in *R.L.C.*, the statutory language is different, no sentencing policies and practices are implicated, and directions to sentencing courts about how to implement the guidelines have no relevance. Thus while Kuhn argues that the underlying conduct involved in his conviction was de minimus, I am not persuaded that the provision in question here permits consideration of

the specific acts underlying a particular conviction. The relevant question is whether the individual has been convicted of a felony.

While sentencing judges have always been obliged to make individualized sentencing determinations, the provision at issue here takes a categorical or generic approach; the weight of uncontradicted authority indicates that the maximum sentence for purposes of 27 C.F.R. § 555.11 is that which might be imposed upon any individual convicted of violating the particular statutory provision criminalizing the conduct, and not the high end of the sentencing guidelines setting the presumptive sentence for any one specific individual in particular. It is thus the United States Code, not the sentencing guidelines, which provides the appropriate measure for determining when an individual has been convicted of "a crime punishable by imprisonment for a term exceeding one year." This was and is true both before and after *Booker*.

Kuhn's brief characterizes the issue in this case as being, "whether or not the Federal Sentencing Guidelines created by the Federal Sentencing Reform Act or 1984 are still considered relevant when considering an application for explosives permit" I do not understand the use of the word "still" in this context. The sentencing guidelines have never been held to be relevant to consideration of an application for an explosives permit, nor are they relevant in this case. Kuhn is mistaken in his belief that they can affect the outcome here.

VI. CONCLUSION

Under 18 U.S.C. § 843(b)(1), the government is authorized to deny an application for an explosives license or permit if the applicant is a person described

in § 842(i). Brandon Kuhn is such a person because he was convicted of a crime punishable by imprisonment for a term exceeding one year, and he is ineligible as a matter of law to receive or possess explosives. Distribution of explosives to him is expressly prohibited in 18 U. S.C. § 842(d)(2).

VII. RECOMMENDED ORDER

IT IS RECOMMENDED AND ORDERED that there be no hearing on the matter of the Application of Brandon Kuhn for Explosives License or Permit that he submitted to the Bureau of Alcohol, Tobacco, Firearms, and Explosives on or about January 19, 2006 because there is no genuine issue of material fact to resolve at a hearing.

IT IS FURTHER RECOMMENDED AND ORDERED that the Notice of Denial of Application for License or Permit that was issued to Brandon Kuhn by the Director of Industry Operations, Bureau of Alcohol Tobacco, Firearms and Explosives on or about October 4, 2006, BE APPROVED AND AFFIRMED.

s/Ellen K. Thomas
Ellen K Thomas, Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of January, .2008, I have served copies of the foregoing Summary Decision and Order on the following persons at the addresses indicated:

Russel M. Vander Werf
Director of Industry Operations
Bureau of Alcohol, Tobacco, Firearms and Explosives
Houston Field Division
15355 Vantage Parkway West, Suite 200
Houston, Texas 77032-1960

Carla E. Young, Esq.
Division Counsel
Bureau of Alcohol, Tobacco, Firearms and Explosives
15355 Vantage Parkway West, Suite 200
Houston, TX 77032

Brandon Kuhn Crystal Caverns
8625 FM 1863
San Antonio, TX 78266

Melissa Anderson, Esq. Office of Chief Counsel
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Ave. N.E
Washington, DC 20226

s/ Jacyln Brickman
Jaclyn Brickman
Attorney Advisor to Administrative Law Judge
Ellen K. Thomas
(703) 305-1742 Phone
(703) 305-1515 Fax

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

May 1, 2008

Order After Denial or Revocation Hearing

15

In the matter of:
Application for permit to use explosives, Type 33,
(5—TX-091-33—PA-01118)

File by or Issue to: (Name of licensee or permittee)

Mr. Brandon Kuhn,
dba, Crystal Caverns

Address of licensee or permittee
(street, city, state and zip code)

8625 FM 1863
San Antonio, Texas 78266

XX The denial of the application described above is sustained.

If you are dissatisfied with this action you may, within 15 days after receipt of this order, appeal this decision to the Director, Bureau of Alcohol, Tobacco, Firearms and Explosives as provided in 27 CFR 555.79, or you may without appeal to the Director and within 60 days after receipt of this order, file a petition for judicial review of this action with U.S. court of appeals for the district in which you reside or have your principal place of business.

Date May 1, 2008

Signature and address, Director, Industry Operations, Bureau of Alcohol, Tobacco, Firearms and Explosives:

s/ Russel Vander Werf

15355 Vantage Parkway West, Ste. 200, Houston, TX 77032

I certify that on the dates shown below, I served the above notice on the person identified below by certified mail to the person at the address shown below.

7007-2560-0002-8747-7147

Address where notice served

8625 FM 1863
San Antonio, Texas 78266

ATF Form 5400.9
Revised( )

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
BUREAU OF ALCOHOL, TOBACCO, FIREARMS
AND EXPLOSIVES

May 1, 2008

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IN THE MATTER OF THE DENIAL OF:

BRANDON KUHN D/B/A
CRYSTAL CAVERNS

ATF CASE NO. 5-TX-091-3 3-PA-01118

ORDER DISAPPROVING APPLICATION FOR EXPLOSIVES PERMIT

LEGAL GROUNDS FOR LICENSE/PERMIT DENIAL

Title 18, United States Code, section 843(b)(1) and Title 27, Code of Federal Regulations, § 555.49(a)(2)(ii), provide that the Chief, Firearms and Explosives Licensing Center, will approve a properly executed application for a license or permit, if the applicant is not a person to whom distribution of explosive materials is prohibited under the Act.

Title 18, United States Code, section 842(i)(1) provides that it shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce.

Title 18, United States Code, section 842(d) provides that it shall be unlawful for any person knowingly to distribute explosive materials to any individual who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.

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Title 27, Code of Federal Regulations, § 555.11, defines the term "crime punishable by imprisonment for a term exceeding one year" as "[a]ny offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of one year."

BACKGROUND

On or about January 19, 2006, Brandon Kuhn d/b/a Crystal Caverns filed an application for an explosives permit, Type 33, with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). By Notice of Denial dated October 4, 2006, Kuhn's application was denied because the agency determined that the applicant is a person to whom distribution of explosive materials is prohibited under the Safe Explosives Act, 18 U.S.C. § 842(d), because he was convicted of a crime punishable by a term of imprisonment exceeding one year. See 18 U.S.C. § 842(i)(1). ATF- determined that the applicant was prohibited from possessing, receiving, shipping or transporting explosives in interstate commerce because he was convicted of violating 18 U.S.C. § 472, possession of counterfeit obligations. See, *United States v. Brandon Robert Kuhn*, United States District Court, Western District of Texas, San Antonio Division, Case Number SA-99CR-8-(01)-HG. See G-5.

During the pre-hearing conference held on September 6, 2007, the applicant stipulated that he was convicted of violating 18 U.S.C. § 472, possession of counterfeit obligations. The applicant also stipulated that he filed an Application for Restoration of Explosives Privileges

with ATF and that said application was denied by ATF in a letter dated June 7, 2004. See G-7 and G-8. However, the applicant stated that he did not need relief from an explosives disability because he was not convicted of a crime punishable by a term of imprisonment exceeding one year. The applicant opined that under the applicable sentencing guideline in effect at the time he could not have been sentenced to imprisonment for a term exceeding one year; therefore, he is not subject to the disability set forth in 18 U.S.C. §§ 842(i)(1), and he is not a person to whom the distribution of explosives is prohibited under 18 U.S.C. § 842(d)(2).

On March 26, 2008, ATF mailed a copy of the Certificate of Record and the Summary Decision and Order by Administrative Law Judge Ellen K. Thomas to the applicant and informed the applicant that the Director of Industry Operation was contemplating denying his application. The applicant was given ten (10) days to submit proposed findings and conclusions in this matter; however, none were submitted. Instead, the applicant, by letter dated April 4, 2008, stated that he remained in disagreement with the decision of the Administrative Law Judge and that he wished to seek relief through civil action.

ISSUE

The sole issue presented in this case is whether Brandon Kuhn was convicted of a crime punishable by a term of imprisonment exceeding one year when he was convicted of violating 18 U.S.C. § 472 and sentenced to probation and a fine. I must decide, for purposes of the Safe Explosives Act, whether it is the maximum sentence authorized under the criminal statute which determines whether one has been convicted of a "crime punishable by a term of

imprisonment exceeding one year" under 18 U.S.C. §§ 842(i)(1) and 842(d)(2); or whether the maximum sentence authorized under the mandatory sentencing guideline for a particular defendant determines whether one has been convicted of a "crime punishable by a term of imprisonment exceeding one year".

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After reviewing the complete certified record in the above referenced matter, including all pleadings, papers, letters, stipulations and exhibits submitted by the parties in this matter along with the Summary Decision and Order issued by Administrative Law Judge Ellen K. Thomas, I find that Brandon Kuhn was convicted of violating 18 U.S.C. § 472; and that 18 U.S.C. § 472 is a crime punishable by a term of imprisonment exceeding one year. I find that the maximum penalty authorized for said violation is imprisonment for not more than twenty (20) years as set forth in the criminal code, see 18 U.S.C. § 472, and not the maximum sentence permitted by the mandatory sentencing guideline in effect at the time of Mr. Kuhn's sentencing. Consequently, I find that the applicant, Brandon Kuhn, is prohibited from shipping, receiving, possessing or transporting explosives in interstate commerce under 18 U.S.C. § 842(i)((1); and that the applicant is ineligible as a matter of law to receive or possess explosives under 18 U.S.C. 842(d)(2).

I find that the procedural history of this case is outlined in the Summary Decision and Order issued on January 30, 2008, which also contains a list of the exhibits and or documents filed in this case. I find the legal arguments and case authority in the Summary Decision and Order to be persuasive and the recommendations of the Administrative Law Judge to be well reasoned. As a

result, I hereby accept and adopt the recommendations of the Administrative Law Judge in this case. Furthermore, for the reason set forth in the Summary Decision and Order, the applicant's request for any further hearing before the Administrative Law Judge is hereby denied because the Administrative Law Judge has determined that there is no genuine issue of material fact to resolve at a hearing in this case.

In conclusion, for the reasons set forth in the Summary Decision and Order issued by Administrative Law Judge Ellen K. Thomas on January 30, 2008, the application for an explosives permit, Type 33, filed by Brandon Kuhn, under application no. 5-TX-091-33-PA01118, is hereby *Disapproved* under the authority of Chapter 40, Title 18, United States Code, § 843(b)(1) and Title 27, Code of Federal Regulations, §§ 555.49(a)(2)(ii) because the applicant was convicted of a crime punishable by a term of imprisonment exceeding one year. See the Certification of Record and the Summary Decision and Order attached, adopted and incorporated by reference into this agency decision.

Dated this 1st day of May, 2008

s/ Russel Vander Werf
Russel M. Vander Werf
Director, Industry Operations
Houston Field Division
Bureau of Alcohol, Tobacco, Firearms and Explosives

Attachments:

Summary Decision and Order dated January 30, 2008, Hon. Ellen K. Thomas, Administrative Law Judge.

Certification of Record dated January 30, 2008, Hon. Ellen K. Thomas, Administrative Law Judge.

CERTIFICATION OF SERVICE

I hereby certify that on this 1st day of May, 2008, I have served a copy of the foregoing Order Disapproving Application for Explosives Permit with attachments on the applicant, Brandon Kuhn by certified mail at the address listed below.

Brandon Kuhn
Crystal Caverns
8625 FM 1863
San Antonio, TX 78266

s/ Carla E. Young
Carla E. Young
Division Counsel, Houston
Bureau of Alcohol, Tobacco, Firearms and Explosives

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
December 2, 2008

Charles R. Fulbruge
III
Clerk

23

No. 08-60550
Summary Calendar

BRANDON KUHN, doing business as Crystal Caverns

Petitioner

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS,
AND EXPLOSIVES
(ATF)

Respondent

On Petition for Review from
an Order of the Department of Justice
Agency No. 5-TX-091-33-PA-01118

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:*

Brandon Kuhn ("Kuhn") petitions this court for a review of the Respondent Bureau of Alcohol, Tobacco, Firearms, and Explosives's ("ATF") denial of his application for a permit to import, manufacture, or deal in explosive materials. *See* 18 U.S.C. § 842. Kuhn appealed the ATF's decision pursuant to 18 U.S.C. § 843(e)(2). At the first level of review, an Administrative Law Judge conducted a hearing and recommended denying Kuhn's application. The Director of Industry Operations of the ATF, representing the Attorney General, sustained the denial in a written decision. Kuhn now petitions this court for review.

We review the denial of an explosives permit pursuant to the Administrative Procedure Act ("APA"), codified at 5 U.S.C. §§ 701-706. *See* 18 U.S.C. § 843(e)(2). Pursuant to 5 U.S.C. § 706(2)(A) & (C), we "hold unlawful and set aside agency action, findings, and conclusions found to be" "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

As the reviewing court, "the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4

error." 5 U.S.C. § 706 [1] "To the extent that this appeal challenges the Director's interpretation of the statutory provisions ATF administers, we utilize principles of *Chevron* deference." *Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, --- F.3d ----, 2008 WL 4530536, at *4 (3d Cir. Oct 10, 2008) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

Pursuant to 18 U.S.C. § 842(i)(1), ATF denied Kuhn an explosives permit because "[i]t shall be unlawful for any person ... who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to "to ship or transport any explosive in or affecting interstate or foreign commerce or to receive or possess any explosive which has been shipped or transported in or affecting interstate or foreign commerce." Kuhn argues that the application of this provision to deny his application is in error. Kuhn concedes he was previously convicted of one violation of 18 U.S.C. § 472 ("Uttering counterfeit obligations or securities"), which is an offense that has a statutory maximum penalty of 20 years imprisonment.

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[1]Kuhn has moved to strike portions of the administrative record because he alleges those portions are either incorrect or prejudicial to his case. Pursuant to § 706, we must review the entire administrative record or those parts of it cited by the parties with due account taken of the rule of prejudicial error. Kuhn does not cite to any authority that permits this reviewing court to strike portions of the record based solely on one party's wishes and conclusory allegations of prejudice. Even assuming *arguendo* that we strike the portions that Kuhn requests, any change to the administrative record does not affect our decision. We therefore deny Kuhn's motion to strike.

However, Kuhn contends that because the Sentencing Guidelines were mandatory at the time of his conviction, the term of his actual sentence controls whether he committed a crime punishable for a term exceeding one year. According to Kuhn, because his guidelines sentence was between zero to six months imprisonment, his convicted offense was not a crime punishable by imprisonment for a term exceeding one year and therefore § 841(i)(1) should not bar him from obtaining an explosives permit.

His argument is without merit. The statute's plain language indicates that the application of § 841(i)(1) turns on the term of imprisonment punishable by the offense of conviction and indictment and does not turn on the petitioner's actual sentence. In interpreting another statute with identical language, the Supreme Court has noted that "[i]t was plainly irrelevant to Congress whether the individual in question actually receives a prison term; the statute imposes disabilities on one convicted of "a crime punishable by imprisonment for a term exceeding one year."" *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 113 (1983) (interpreting 18 U.S.C. § 922(g)).[2] In other words, the petitioner's actual sentence is irrelevant to the statute's application. Since the offense of petitioner's valid conviction is punishable by imprisonment exceeding one year, the ATF acted in accordance with law and was not arbitrary nor capricious in denying his permit application.

For the foregoing reasons, the petition for review is DENIED.

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[2]This holding remains good law even though other aspects of *Dickerson* have been effectively superseded by statute. *See Caron v. United States*, 524 U.S. 308, 313 (1998); *United States v. Daugherty*, 264 F.3d 513, 516 & n.7 (5th Cir. 2001); *United States v. Cisneros*, 112 F.3d 1272, 1281 (5th Cir. 1997).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. Court of Appeals

FILED
January 27, 2009

27

Charles R. Fulbruge III
Clerk

No. 08-60550

BRANDON KUHN, doing business as Crystal Caverns
Petitioner

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES
(ATF)
Respondent

Petition for Review of an Order of the
U.S. Department of Justice

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 12/2/08, 5 Cir., _____, _____ F. 3d _____)

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ James Dennis
United States Circuit Judge

REHG-5A

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF THE
MANDATE